

Basic Guideline Application

2-28-15



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Outline

- Sentencing under the federal guidelines system
- Overview of single count guideline application
- Relevant Conduct
- Criminal history

Federal Sentencing System



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The Nature of a Federal Sentence

The Sentencing Reform Act of 1984

- Determinate sentences; no parole
- Supervised release
 - Available for all felonies and Class A misdemeanors
 - See 18 U.S.C. §§ 3559(a) & 3583(b)&(e)(3)

The Nature of a Federal Sentence (cont.)

The Sentencing Reform Act of 1984

- Good time
 - Maximum of 54 days per year
 - Not available for sentences of one year or less, or for a life sentence
 - See 18 U.S.C. § 3624(b)(1)

The Nature of a Federal Sentence (cont.)

The Sentencing Reform Act of 1984

- The use of sentencing guidelines created by the U.S. Sentencing Commission as directed by statute to achieve the statutory purposes of sentencing at 3553(a)(2) by
 - providing certainty & fairness
 - while maintaining individualized sentencing
 - avoiding unwarranted sentencing disparities
 - and the development of means of measuring the effectiveness of sentencing, penal, and correctional practices in meeting the purposes of sentencing

Modified Real Offense Guideline System

- Finding too many negatives both in pure “real offense” sentencing and pure “charge offense” sentencing, the Commission developed a modified real offense guidelines system
 - The guidelines begin as an offense of conviction system, with the applicable offense guideline being determined by the offense of conviction
 - However, in the application of a given offense guideline and other guidelines adjustments, there are numerous real offense considerations

Sentencing in the Advisory Guidelines System

- Sentences are to be based on the factors at 18 U.S.C. § 3553(a)(1)-(7)
- Correct guideline application is the required starting point in sentencing
- Sentences are reviewed for “reasonableness”

18 U.S.C. § 3553(a)

The court is to impose a sentence
sufficient but not greater than necessary
to comply with the “purposes of sentencing”

Punishment, deterrence,
incapacitation & rehabilitation
(§ 3553(a)(2))

§ 3553(a)(1) - (7) Factors

The court shall consider:

- (1) Nature & circumstances of offense;
history and characteristics of defendant
- (2) “Purposes of sentencing”
Punishment, deterrence, incapacitation & rehabilitation
- (3) Kinds of sentences available

§ 3553(a)(1) - (7) Factors (cont.)

The court shall consider:

- (4) The sentencing guidelines *(Step 1 of 3-Step)*
- (5) The guideline policy statements *(Step 2 of 3-Step)*
- (6) Avoiding unwarranted sentencing disparities
- (7) Need to provide restitution

3-Step Approach to Federal Sentencing



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3-Step Approach to Federal Sentencing

Step 1

Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines

See §1B1.1(a)

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
Zone A	0-6	0-6	0-6	2-8	4-10	6-12
	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	6-12	8-14	10-16	15-21	21-27	24-30
	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

3-Step Approach to Federal Sentencing (cont.)

Step 2

Consider the Commission's policy statements, including those addressing departures, that might warrant consideration in imposing sentence

See §1B1.1(b)

Guidelines Manual Policy Statements

- Express the Sentencing Commission's policy judgments regarding various sentencing considerations
- Include the Commission's policy regarding "departures"
 - A "departure" is a sentence outside a calculated guideline range based on policy in the *Guidelines Manual*

Policy Statements Regarding Departures

- Chapter One, Part A
- Chapter Five, Part K
 - **§5K1.1 Substantial Assistance (requires a government motion)**
 - §5K2.0 Grounds for Departure
 - §5K2.1 – 2.24 Various bases for departures
 - **§5K3.1 Early Disposition Programs (“Fast Track”) (requires a government motion)**

Policy Statements Regarding Departures (cont.)

- Chapter Five, Part H - Specific Offender Characteristics
 - Some factors *may be relevant*
 - Some factors *are not ordinarily relevant*
 - Some factors *are not relevant*
 - *See 28 § U.S.C. 994(d), (e)*
- §4A1.3 - Inadequacy of Criminal History Category

Policy Statements Regarding Departures (cont.)

- Other specific commentary
 - *E.g.*, in a Chapter Two offense guideline
- *Note*: comprehensive List of Departure Provisions in back of *Guidelines Manual*

3-Step Approach to Federal Sentencing (cont.)

Step 3

Consider § 3553(a) taken as a whole...

See §1B1.1(c)

18 U.S.C. § 3553(a)

The court is to impose a sentence
sufficient but not greater than necessary
to comply with the “purposes of sentencing”

Punishment, deterrence,
incapacitation & rehabilitation
(§ 3553(a)(2))

Note: a court may not impose or lengthen a prison term to promote a defendant’s rehabilitation – *Tapia v. U.S.*, 131 S. Ct. 2382 (2011)

§ 3553(a)(1) - (7) Factors

The court shall consider:

- (1) Nature & circumstances of offense;
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Punishment, deterrence, incapacitation & rehabilitation
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§ 3553(a)(1) - (7) Factors (cont.)

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- (7) Need to provide restitution

Step 3 (continued)

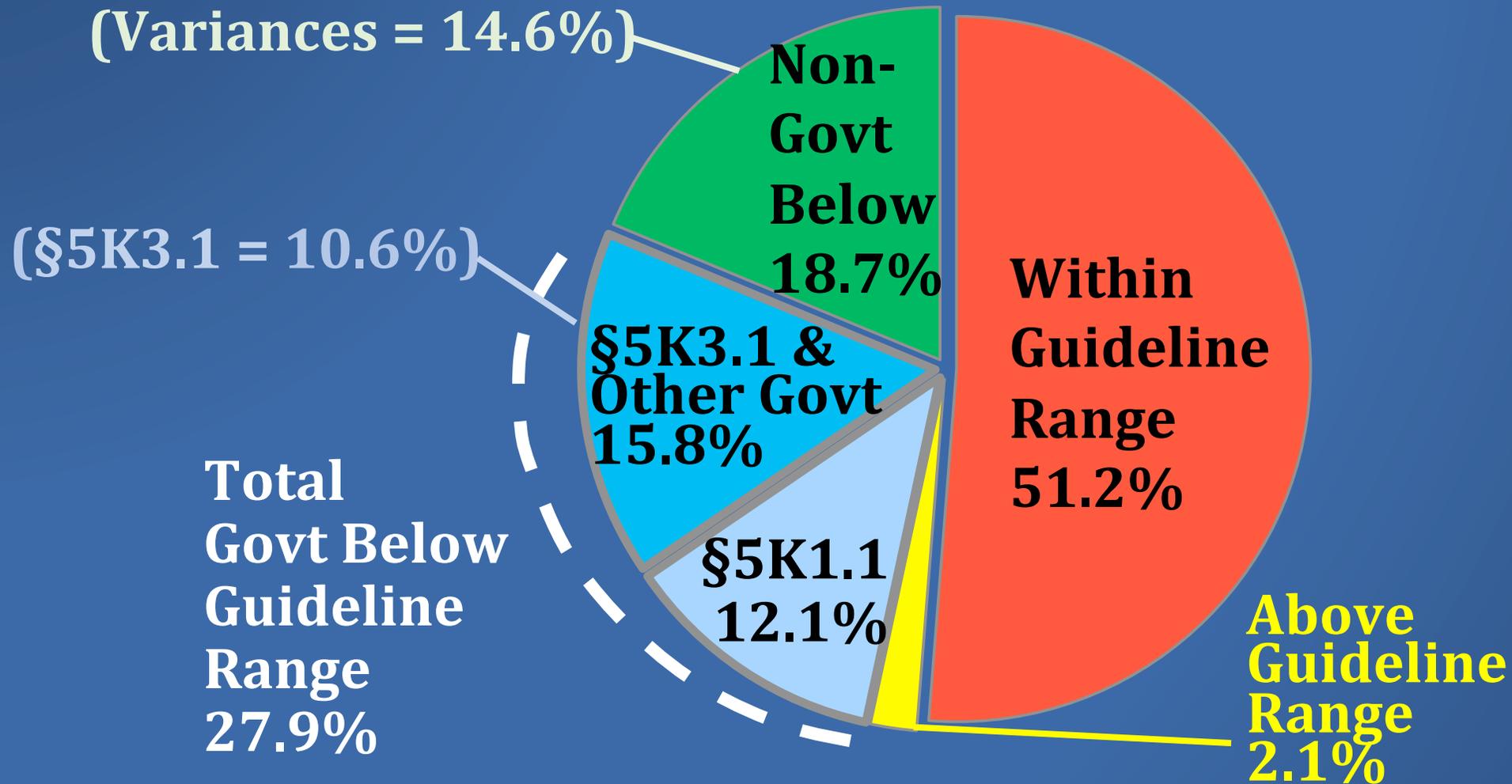
...and determine if the appropriate sentence is

- One within the advisory guideline system:
 - a sentence within the guideline range
 - a “*departure*”

OR

- One outside the advisory guideline system:
 - a “*variance*”

Position of Sentences in Relation to Guideline Range National - FY 2013



SOURCE: 2013 Sourcebook of Federal Sentencing Statistics

Overview of the Sentencing Process

- Plea/verdict of guilty
- U.S. probation officer (USPO) does a presentence investigation (PSI) & presentence report (PSR)
 - Gathers facts
 - **Applies guidelines**
 - Provides PSR to parties

Overview of the Sentencing Process (cont.)

- Parties review PSR; advise USPO of any disputes
- USPO resolves disputes as possible; submits amended PSR and addendum of unresolved disputes to parties and the judge
- At the sentencing hearing the judge will resolve disputes as necessary

Note: In addition to sentencing, the PSR is used by

- The Bureau of Prisons in a variety of decisions, *e.g.*,
 - Security level *classification*
 - *Designation* to a specific correctional institution
 - Programming eligibility
 - Furlough and halfway house eligibility
- The USPO in a variety of decisions regarding the supervision under probation or supervised release, *e.g.*,
 - Level of supervision
 - Travel authorization

Pointers for the Application of the Guidelines

- The sentencing judge resolves disputed issues
(§6A1.3)
- Standard of proof: preponderance **(§6A1.3)**
- Burden of persuasion: falls on party seeking the
adjustment

Pointers for the Application of the Guidelines (cont.)

- Rules of evidence do not apply
(Fed. R. Evid. 1101(d)(3))
- Evidence must have sufficient indicia of reliability to support probable accuracy **(§6A1.3(a))**

Overview of Basic Guideline Application



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	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	6-12	8-14	10-16	15-21	21-27	24-30
	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
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	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
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	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

The Statutes “Trump” the Guidelines

Regardless of what sentence the guidelines may call for, the sentence imposed must fall within the restrictions set by statute

(*e.g.*, statutory maximums and mandatory minimums)

-*See* §§5G1.1 & 5G1.2

Guidelines Manual

- Ch. One Introduction, definitions, application principles
- Ch. Two Offense guidelines
- Ch. Three Generic adjustments
- Ch. Four Criminal history

- Ch. Five Determining the guideline range and other aspects of the sentence
- Ch. Six Sentencing procedures & pleas
- Ch. Seven Violations of probation & supervised release
- Ch. Eight Sentencing of organizations
- Appx A Statutory Index

Application Instructions

§1B1.1(a)

1. Determine from Appendix A which Chapter Two offense guideline is applicable for the offense of conviction
2. Apply the Chapter Two offense guideline to determine the offense level
3. Apply the generic Chapter Three adjustments for Victim, Role & Obstruction

Application Instructions (cont.)

§1B1.1(a)

4. If there are multiple counts of conviction, apply the Chapter Three adjustment for Multiple Counts to establish a single offense level
5. Apply the Chapter Three adjustment for Acceptance of Responsibility

Application Instructions (cont.)

§1B1.1(a)

6. Apply Chapter Four, Part A to determine the defendant's criminal history category;
Apply Chapter Four, Part B adjustments that affect the criminal history category and/or offense level
7. Determine the guideline range on the Sentencing Table in Chapter Five, Part A, for the established offense level & criminal history category

Application Instructions (cont.)

§1B1.1(a)

8. Based on the guideline range, determine from Chapter Five, Parts B - G the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines & restitution

Ex Post Facto

- 18 U.S.C. § 3553(a)(4)
 - Use guidelines in effect at sentencing
- *U.S. v. Peugh*, 133 S. Ct. 2072 (U.S. 2013)
 - *Ex post facto* applies to the federal sentencing guidelines
- §1B1.11
 - “One Book Rule”

Single Count Scenario

Robbery Scenario



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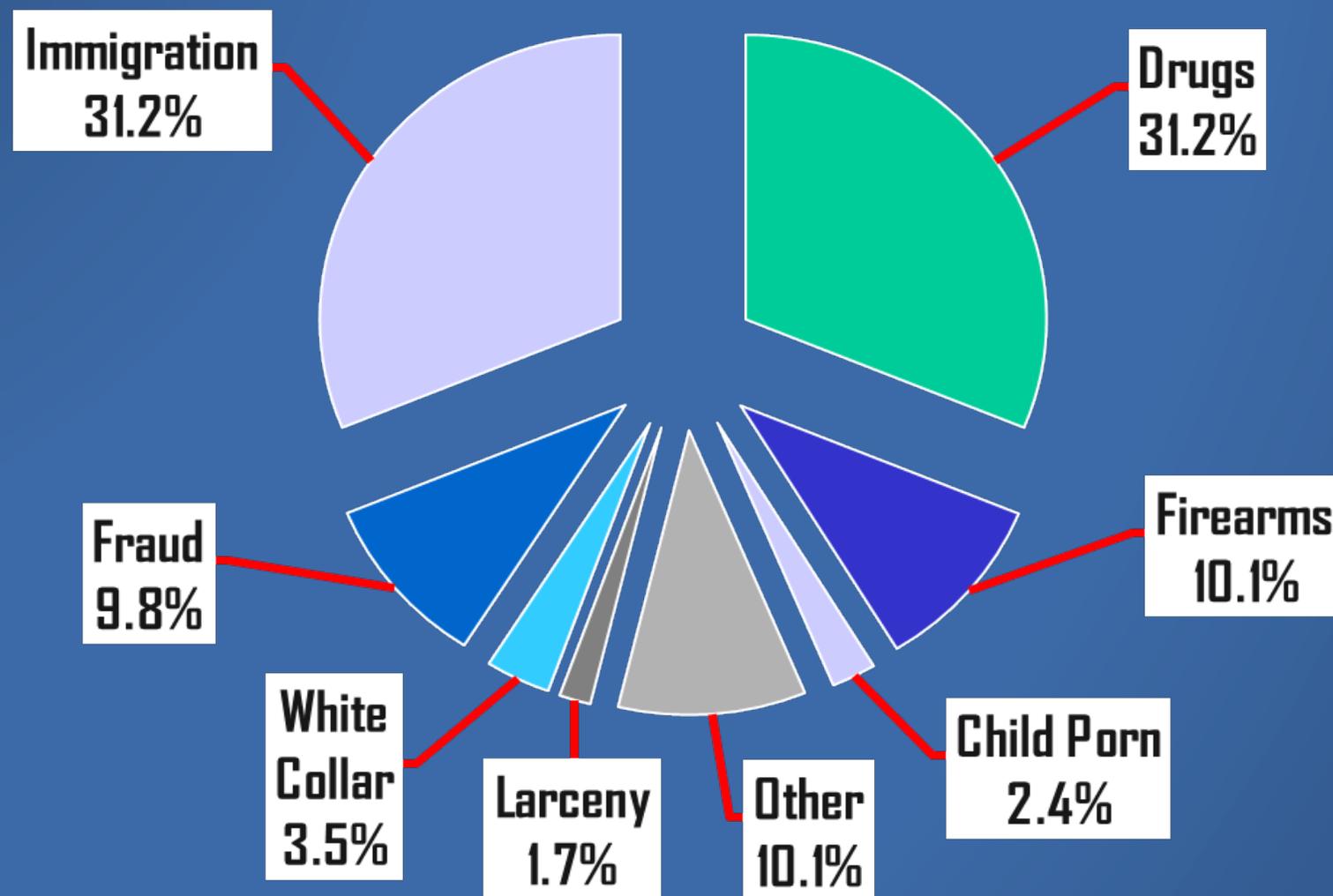
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Primary Offense Types

National - FY 2013



SOURCE: 2013 Sourcebook of Federal Sentencing Statistics

Robbery Scenario Facts

- Defendant A convicted of 18/2113(a)&(d)
- Def. A and co-participant robbed federally insured bank
- Robbery planned by Def. A who directed co-participant
- Def. A carried pistol; co-participant carried knife
- Def. A pushed teller, resulting in cut, bruises & contusions

Robbery Scenario Facts (cont.)

- While not part of plan, nor directed by Def. A, the co-participant restrained a customer by binding him with tape and forcing him into a closet
- \$15K in bank loot taken; divided \$9K for Def. A and \$6K for co-participant; \$5K recovered from Def. A, but nothing recovered from co-participant

Robbery Scenario Facts (cont.)

- Within days of apprehension, Def. A provided full information to the govt., and announced intentions to plead guilty; the govt. will make a motion for “full” acceptance of responsibility

Robbery Scenario Facts (cont.)

- Def. A's prior record, all since age 18:
 - 6 yrs. prior to instant robbery; auto theft: 2 yrs. probation
 - 3 yrs. prior to instant robbery; grand larceny: 6 mos. jail & 3 yrs. probation
 - On this probation at the time of the instant federal offense

General Approach of the Federal Sentencing Guidelines

- Begins as an offense of conviction system
- Then considers many real offense characteristics

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
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	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	6-12	8-14	10-16	15-21	21-27	24-30
	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
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	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Single Count Application

Chapter Two (*offense of conviction* guideline)

- Base Offense Level
- Specific Offense Characteristics
- Cross References

Chapter Three (*generic* guidelines)

- Victim
- Role
- Obstruction
- [Multiple Counts]
- Acceptance

Determining the Applicable Chapter Two Guideline

§1B1.2(a)

- Use the Chapter Two guideline applicable to the offense of conviction
- Refer to the Statutory Index (Appendix A) in this determination
- If no guideline is listed, use §2X5.1 for finding an analogous guideline for a felony (stat. max. over 1 yr.), or §2X5.2 for a Class A misd.

Appendix A

Statute

18 U.S.C. § 2111

18 U.S.C. § 2112

18 U.S.C. § 2113(a)

18 U.S.C. § 2113(b)

18 U.S.C. § 2113(c)

18 U.S.C. § 2113(d)

Guideline

2B3.1

2B3.1

2B1.1, 2B2.1,
2B3.1, 2B3.2

2B1.1

2B1.1

2B3.1

- §2B1.1 Larceny, Embezzlement, Fraud and Forgery
- §2B2.1 Burglary
- **§2B3.1 Robbery**
- §2B3.2 Extortion by Force or Threat of Injury or Serious Damage

§2B3.1 Robbery

(a) Base Offense Level:	20
(b) Specific Offense Characteristics	<u>Levels</u>
(1) financial institution or post office	+2
(2) firearm, weapon, death threat	+2 to +7
(3) victim injury	+2 to +6
(max. of 11 offense levels from (b)(2) & (b)(3))	

(b) SOC's (cont.)Levels

(4) abduction

+4

restraint**+2**

(5) carjacking

+2

(6) taking of a firearm,
destructive device,
or controlled substance

+1

(7) loss of \$10,000+ to \$5 million+**+1 to +7**

(c) Cross Reference

(1) if victim murdered, apply the guideline
for First Degree Murder (§2A1.1)

Chapter Three Adjustments

- Victim-Related Adjustments
- Role in the Offense
- Obstruction
- Multiple Counts
- Acceptance of Responsibility

Victim-Related Adjustments

Chapter Three, Part A

Levels

- §3A1.1 Hate Crime Motivation
or Vulnerable Victim
W/Large Number
+3
+2
+2
- §3A1.2 Official Victim
+3, +6 or +6
- **§3A1.3 Restraint of Victim**
+2

Victim-Related Adjustments (cont.)

Chapter Three, Part A

- | | <u>Levels</u> |
|---------------------------------------|---------------------------|
| • §3A1.4 Terrorism | +12
(Floor 32; CHC VI) |
| • §3A1.5 Serious Human Rights Offense | +2 or +4 (Floor 37) |

Role in the Offense

Chapter Three, Part B

Levels

- **§3B1.1 Aggravating Role** +4,+3 or +2
- **§3B1.2 Mitigating Role** -4, -3 or -2
- **§3B1.3 Abuse of a Position of Trust or Use of a Special Skill** +2

Role in the Offense (cont.)

Chapter Three, Part B

Levels

- §3B1.4 Using a Minor to Commit a Crime +2
- §3B1.5 Use of Body Armor in Drug Trafficking and Crimes of Violence +2 or +4

Obstruction

Chapter Three, Part C

Levels

- **§3C1.1 Obstructing or Impeding the Administration of Justice** +2
- §3C1.2 Reckless Endangerment During Flight +2

Obstruction (cont.)

Chapter Three, Part C

Levels

- §3C1.3 Commission of an Offense While on Release +3
- §3C1.4 False Registration of Domain Name +2

Acceptance of Responsibility

Chapter Three, Part E

- **2-Level Reduction:**

If defendant clearly demonstrates affirmative acceptance of responsibility for the offense.

- **1-Level Additional Reduction Possible**

Requirements for 1-Level Additional Reduction

§3E1.1(b)

- Only if 2-level reduction applicable
- Must be at least offense level 16
- Government motion required
- Must give timely notification of plea of guilty

Pointers about Chapters Two and Three Application

- Offense levels are cumulative (**§1B1.1, App. Note 4**)
- Within sections, use greatest (**§1B1.1, App. Notes 4(A) & 5**)
- No issue of “double counting” unless directed by guidelines (**§1B1.1, App. Note 4(B)**)
- “Adjustments” are distinct from “departures” and “variances” (**Chapter Three & §5K2.0 & § 3553(a)**)

END

Relevant Conduct

§1B1.3



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Relevant Conduct – The Gatekeeper

§1B1.3

- Relevant Conduct does not create any additional guideline characteristics or adjustments
- *Rather*, Relevant Conduct serves as a gatekeeper in determining the conduct to be considered in the application of the *existing* characteristics and adjustments

Relevant Conduct Synopsis

- The defendant is held accountable for anything he/she does during the offense of conviction, preparing for that offense, or avoiding detection/responsibility for that offense
- The defendant is held accountable for some conduct of co-conspirators

Relevant Conduct Synopsis (cont.)

- For certain offense types, the defendant is also held accountable for conduct outside the offense of conviction, when in the same course of conduct or common scheme or plan

Relevant Conduct

§1B1.3

(a): Establishes what is relevant for Chapters Two and Three

- Base offense levels (BOL's)
- Specific offense characteristics (SOC's)
- Cross references
- Chapter Three Adjustments

(b): Establishes what is relevant for Chapters Four and Five

Relevant Conduct

§1B1.3(a)

(a)(1) & (a)(2): Analysis to establish relevant acts

(a)(3): Harms from the acts established
in (a)(1) & (a)(2)

(a)(4): Information specified for application in a
particular guideline

Subsections (a)(1) and (a)(2)

§1B1.3(a)

- Responsible for most application issues
- Requires an analysis
 - Keyed to the offense of conviction
 - Requires determinations of “WHO” & “WHEN”

(a)(1) & (a)(2): Analysis

WHO: (a)(1)(A): Acts of the defendant

WHEN: (a)(1)(B): Certain acts of others
(3-part analysis)

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
Common scheme or plan

Holding a Defendant Accountable for His/Her Acts Under Relevant Conduct

§1B1.3(a)(1)(A)

(a)(1)(A) Analysis of §1B1.3(a)(1)

WHO: (a)(1)(A): Acts of the defendant:
**Acts committed, aided, abetted,
counseled, commanded,
induced, procured, or willfully
caused by the defendant**

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

**Avoiding
detection**

Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct

§1B1.3(a)(1)(B)

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

(a)(1)(B) Analysis of §1B1.3(a)(1)

WHO: (a)(1)(B): Certain acts of others:

3-part analysis:

- scope of undertaking
- acts of others in furtherance
- and reasonably foreseeable

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination
- Based on each defendant's undertaking
- Can be established by explicit agreements and implicit agreements inferred from the conduct of the defendant and others

Standard for “Reasonable Foreseeability”

§1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant
- Based on an objective person standard:
 - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?

Example: Holding Defendant Accountable for the Act of Another

§1B1.3(a)(1)(B)

- Def. convicted of robbery: §2B3.1
- Co-participant carried gun
- If determined that
 - Def.'s undertaking with co-participant was robbery
 - co-participant carried gun in furtherance, and
 - a reasonable person would have foreseen that actit will be relevant conduct
- SOC for firearm will apply

Holding a Defendant Accountable for the Acts of Others In a Broadly Worded Count of Conviction, Such as a Drug Trafficking Conspiracy

§1B1.3(a)(1)(B)

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

- 1. The scope of the defendant's jointly undertaken criminal activity**
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

Determining Scope in a Conspiracy

§1B1.3, App. Note 2

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

Determining Scope in a Conspiracy (cont.)

“Bright Line Rule”
of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

Example: Holding Defendant Accountable for the Act of Another

§1B1.3(a)(1)(B)

- Def. convicted of drug conspiracy: §2D1.1
- Conspiracy involved multiple importations; Def. was involved in two of those
- If Def.'s undertaking was two importations, Def. will only be accountable for acts of others within those two importations, if reasonably foreseeable

“Reasonably Foreseeable”

§1B1.3, App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Reasonable foreseeability applies only to the conduct of others ((a)(1)(B)); it does not apply to the defendant’s own conduct ((a)(1)(A))

Holding a Defendant Accountable for Acts in the Same Course of Conduct or Common Scheme or Plan

§1B1.3(a)(2):

“Expanded” Relevant Conduct

Analysis of §1B1.3(a)(2)

WHO: **(a)(1)(A):** Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(2):

**Same course of conduct/
Common scheme or plan**

Offenses for Which “Expanded” Relevant Conduct⁹⁰ Applies

§1B1.3(a)(2) & “Rule (d)”

- The applicable Chapter Two guideline must be one included in a list at §3D1.2(d) (or be of that type), which is the list used for “grouping” multiple counts of conviction of a certain type
- NOTE: Multiple counts of conviction are not necessary to have “expanded” relevant conduct

Offenses **Included** at §3D1.2(d):

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

“Expanded Relevant Conduct” at §1B1.3(a)(2)
Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
 - Common victims
 - Common accomplices
 - Common purpose
 - Similar *modus operandi*

“Same Course of Conduct”

§1B1.3(a)(2); App. Note 9(B);
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity

Example 1:
RelCon *Includes* Same Course of Conduct /
Common Scheme or Plan

§1B1.3(a)(2)

- Def. convicted of one count of embezzlement of \$5,000; applicable guideline §2B1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. took \$5,000 on each of four other occasions, and that those acts were in the same course of conduct/common scheme or plan, those losses will be relevant conduct
- “Loss” amount for SOC will be \$25,000

Example 2: RelCon *Includes* Same Course of Conduct / Common Scheme or Plan

§1B1.3(a)(2)

- Def. convicted of drug sale of 1 kg on a single occasion; applicable guideline §2D1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. also sold 1 kg per week for 99 weeks, and those acts were in same course of conduct as offense of conviction, that will be relevant conduct
- Application will be based on 100 kg

Offenses for Which “Expanded” Relevant Conduct Does Not Apply

§1B1.3(a)(2) & §3D1.2(d)

- “Expanded” relevant conduct does not apply if the applicable Chapter Two guideline is on the “excluded list” at §3D1.2(d)

Offenses **Excluded** at §3D1.2(d):

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

“Expanded Relevant Conduct” at §1B1.3(a)(2)
Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses

§1B1.3(a)(1) & (a)(2): Analysis

WHO: (a)(1)(A): Acts of the defendant
(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

~~Same course of conduct/
Common scheme or plan~~

Example:

RelCon Does NOT Include Same Course of Conduct/ Common Scheme or Plan

§1B1.3(a)(1)

- Def. convicted of one count of robbery of \$5,000; applicable guideline §2B3.1 which is on the “excluded list” at §3D1.2(d)
- Even if determined that Def. robbed \$5,000 on each of four other occasions, those losses will not be relevant conduct
- Loss will be \$5,000

**Impact of Terms
“Offense” and “Defendant”
Upon the Relevant Conduct
Used in Application**

Definition of “Offense”

§1B1.1, App. Note 1(H)

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3) unless a different meaning is specified or is otherwise clear from the context
 - Note that use of the passive voice infers “offense,” *e.g.*, “if a dangerous weapon *was possessed*” at §2D1.1(b)(2)

Use of Term “Defendant”

§1B1.3

- The use of the term “defendant” limits application from including relevant conduct based on the acts of others under §1B1.3 **(a)(1)(B)**
- NOTE: Defendant *is still accountable* for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused at §1B1.3 **(a)(1)(A)**

Limitation When Term “Defendant” Is Used

WHO: (a)(1)(A): Acts of the defendant

~~(a)(1)(B): Certain acts of others
(3-part analysis)~~

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
Common scheme or plan

Points to Remember Regarding Relevant Conduct Analysis

§1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction ((a)(1)(A) & (a)(1))
- Defendant accountable for certain acts others did in furtherance of the offense of conviction ((a)(1)(B) & (a)(1))

Points to Remember Regarding Relevant Conduct Analysis (cont.)

§1B1.3

- *For certain offenses* (those “included” at §3D1.2(d)), defendant also accountable for acts he/she did, and certain acts others did in the same course of conduct or common scheme or plan as the offense of conviction ((a)(1)(A) and (a)(1)(B) & (a)(2))

END

Chapter Four

Criminal History and “Overrides”



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SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
Zone A	0-6	0-6	0-6	2-8	4-10	6-12
	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	6-12	8-14	10-16	15-21	21-27	24-30
	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Numerous “Rules” in Chapter Four

- Typically clear regarding previous federal record
- Issues more likely to arise regarding previous state/local record
 - Look to case law
 - Established methods used in your court for recurring issues

Criminal History

Measures the seriousness of a defendant's prior record and the likelihood of recidivism

T "Prior Sentences"
(1, 2, or 3 points each)

T "Status"
(2 points)

Criminal History Points

Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Criminal History Points

Prior Offense Committed Before 18

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Length of Prior Sentences

§4A1.2(a) and App. Note 2

- Set by maximum sentence imposed
 - If sentence or any portion is suspended, the maximum is established by the unsuspended portion
- Unaffected by release
 - *E.g.*, release to parole or for “good time”

Some Considerations in Establishing a “Prior Sentence”

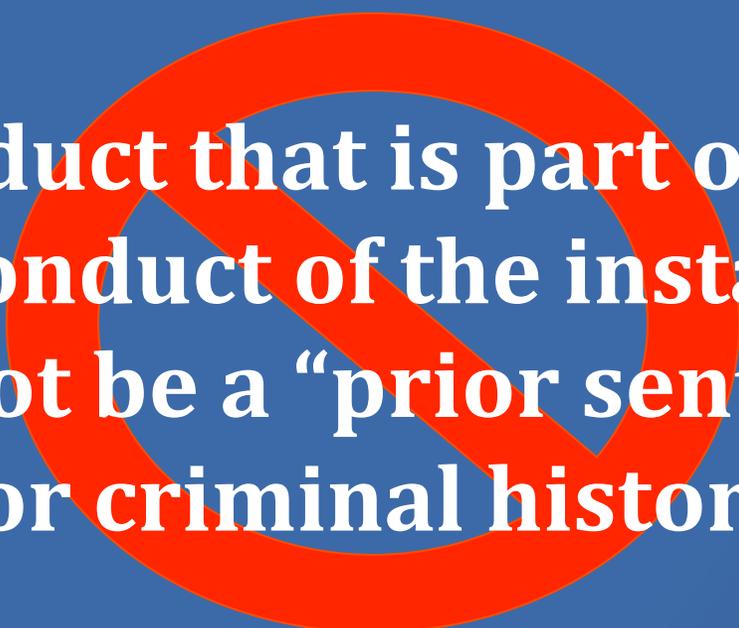
1. Is it part of relevant conduct?
2. Is it within the time frame?
3. Treatment of multiple prior sentences
4. Excluded offenses
5. Various other considerations

**Is the Previous Sentence
Part of Relevant Conduct?**

“Prior Sentence”

§4A1.2(a)(1) & App. Note 1

**Conduct that is part of the
relevant conduct of the instant offense
will not be a “prior sentence”
for criminal history**



“Prior Sentence” (cont.)

§4A1.2(a)(1) & App. Note 1

Note: Some Chapter Two guidelines that consider a defendant’s prior convictions and certain other conduct give direction about also using those considerations in Criminal History, *e.g.*, §2K2.1 (Felon in Possession), App. Note 10; §2L1.2 (Illegal Reentry), App. Note 6

**Is the Previous Sentence
Within the Time Frame?**

Criminal History Points

Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Criminal History Points

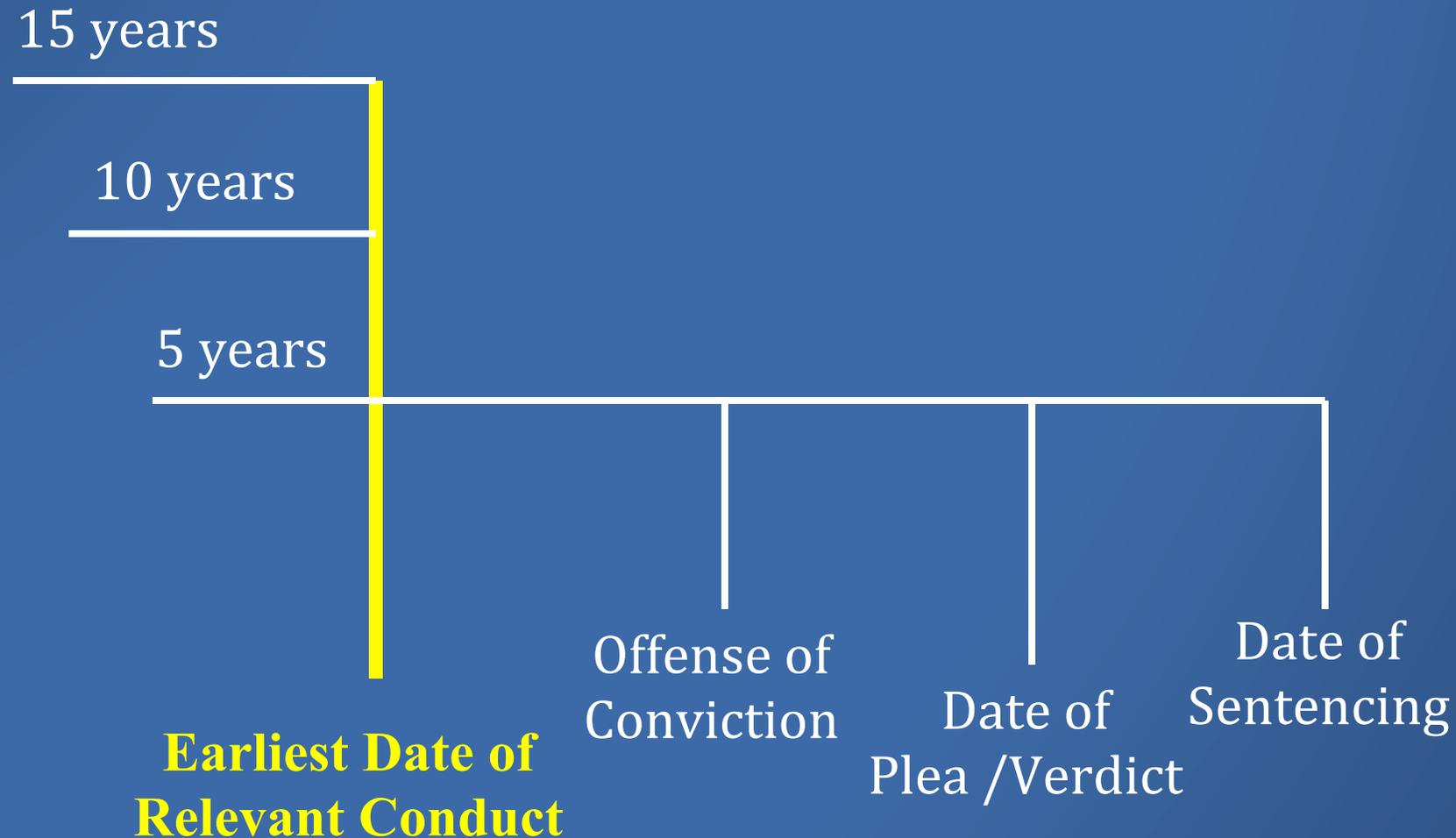
Prior Offense Committed Before 18

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

The Interplay Between Criminal History Time Frames and Relevant Conduct



Relevant Conduct and “Status”

§4A1.1(d) & App. Note 4

- “Status” if under criminal justice sentence during any relevant conduct

Note: “status” can only count if the sentence from which it resulted has been counted

Treatment of Multiple Prior Sentences

§4A1.2(a)(2)

Multiple Prior Sentences

§4A1.2(a)(2)

- Requires a determination of whether multiple prior sentences are counted “separately” or as a “single sentence”

Threshold Determination: Intervening Arrest

§4A1.2(a)(2)

Multiple prior sentences for
offenses separated by an
intervening arrest are counted
separately

Examples:

Separated by Intervening Arrest

offense
arrested
offense
arrested

**Intervening
Arrest**

offense
offense
offense
arrested

**Not an
Intervening
Arrest**

offense
offense
offense
arrested
arrested
arrested

**Not an
Intervening
Arrest**

“Intervening Arrest”

§4A1.2(a)(2)

“i.e., the defendant is arrested for *the first offense* prior to committing *the second offense*”

Examples:

Separated by Intervening Arrest

Theft 1 offense
Arrested Theft 1
Theft 2 offense
Arrested Theft 2

**Intervening
Arrest for
Thefts 1 & 2**

Theft 1 offense
Arrested DUI
Theft 2 offense
Arrested Thefts 1 & 2

**Not an
Intervening
Arrest for
Thefts 1 & 2**

Single Sentence Criteria

§4A1.2(a)(2)

- Multiple prior sentences will be treated as a “single sentence” *if*
 1. Prior sentences are for offenses **NOT** separated by an intervening arrest
 - AND**
 2. The offenses *either*
 - Were named in the same charging document, *or*
 - Resulted in sentences imposed on the same day

Impact of a “Single Sentence”

§4A1.2(a)(2)

Rather than add points for each prior sentence:

- If concurrent sentences
 - Use the longest sentence
- If consecutive sentences
 - Use the aggregate length of the sentences

Point Assignments and “Single” Sentences

Example **Consecutive** Sentences

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
1 mo.		1 pt.
4 mos. consec.	}	2 pts.
<u>9 mos. consec.</u>		<u>2 pts.</u>
14 mos.	3 pts.	5 pts.

Point Assignments and “Single” Sentences

Example **Concurrent** Sentences

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
1 mo.		1 pt.
4 mos. concur.	}	2 pts.
<u>9 mos. concur.</u>		<u>2 pts.</u>
9 mos.	2 pts.	5 pts.

A “Single Sentence” That Includes Crimes of Violence

§4A1.1(e)

- When multiple prior sentences are treated as a “single sentence,” §4A1.1(e) adds 1 point for each crime of violence that did not result in additional points under §4A1.1(a), (b), or (c)

A “Single Sentence” That Includes Crimes of Violence (cont.)

§4A1.1(e)

- Example:
 - Defendant was convicted of 3 bank robberies that had not been separated by intervening arrests
 - Defendant was sentenced on the same day to 5 years for each robbery to run concurrently
 - Single sentence: 3 points (§4A1.1(a))
 - 1 point added for crime of violence that did not receive points: 2 additional points (§4A1.1(e))

Significance of Multiple Prior Sentences Being Treated as a Single Sentence

- Typically results in fewer criminal history points
- Possible impact on application of certain other guideline provisions, *e.g.*,
 - counted as only a single prior in the determination of §4B1.1 (Career Offender, §4B1.2(c)) and in base offense levels of §2K2.1 (Firearms Offenses)

Excluded Offenses

§4A1.2(c)(1) & (c)(2)

Excluded Offenses

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(1) - List of misdemeanors and petty offenses that are only counted when:
 - The sentence was probation of more than one year
 - The sentence was imprisonment of at least thirty days
 - The prior offense was similar to an instant offense
 - *E.g.*, driving without license or with suspended license

Excluded Offenses (cont.)

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(2) - List of misdemeanor and petty offenses that are never counted
 - *E.g.*, hitchhiking
- “Misdemeanor” means having a maximum statutory penalty of one year or less
 - Note: All such offenses are counted if a “felony offense” (*i.e.*, maximum of over 1 yr.)

Other Considerations

- Expungements, diversionary dispositions, pardons
 - §4A1.2(f) & (j), App. Notes 9 & 10
- Prior revocations of supervision
 - §4A1.2(k) and App. Note 11
 - Note: this can affect the “time frame” for counting the prior sentence

General Approach in Handling Revocations: Add time imposed at original sentencing with time imposed upon revocation

- Original sentence 3 yrs. imprisonment, suspended upon service of 1 yr. w/ 5 yrs. probation to follow
- Probation revoked; 6 mos. imposed
 - 1 yr. original sentence
 - + 6 mos. revocation sentence
 - 1 yr. 6 mos. = **3 points**

“Overrides”

Chapter Four, Part B (Also §3A1.4 - Terrorism)



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Chapter Three and Chapter Four “Overrides”

§3A1.4	Terrorism
§§4B1.1 - 4B1.2	Career Offender
§4B1.3	Criminal Livelihood
§4B1.4	Armed Career Criminal
§4B1.5	Repeat and Dangerous Sex Offender Against Minors

§4B1.1 Career Offender Criteria

- Defendant at least 18 at time of instant offense
- Instant offense of conviction is a felony for a “crime of violence” or a “controlled substance offense”
- At least two prior felony convictions for a “crime of violence” or “controlled substance offense,” counted *separately* under the provisions of §4A1.1(a), (b), or (c)

Career Offender “Override”

§4B1.1; Pursuant to Directive at 28 § 994(h)

- Criminal History Category is VI
- Offense level determined by a table based on statutory maximum
 - Unless the offense level from Chapters Two and Three is greater

**Statutory
Maximum****Offense
Level ***

Life

37

25 years +

34

20 years +

32

15 years +

29

10 years +

24

5 years +

17

More than 1 year

12



*** Decrease by number of levels (0 or -2 or -3) at §3E1.1 (Acceptance of Responsibility)**

END

Sentencing Table (Ch. 5, Part A) & Zones (§5C1.1)



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SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

**Impact of Statutory Penalties
on the Guideline Range:
The Statutes “Trump” the Guidelines**

§§5G1.1 & 5G1.2

Statutory Maximum's Impact on Sentencing Range

Guideline Range Computed
51-63

Statutory Maximum
5 years
(60 months)

51-60

Mandatory Minimum's Impact on Sentencing Range

Guideline Range Computed
51-63

Mandatory Minimum
5 years
(60 months)

60-63

Zones

§5C1.1

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
Zone A	0-6	0-6	0-6	2-8	4-10	6-12
	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	6-12	8-14	10-16	15-21	21-27	24-30
	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Sentencing Table

Criminal History Category

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	Zone A		0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	Zone B		8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	Zone C		21-27	24-30
11	8-14	10-16	12-18	15-21	27-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	Zone D		33-41

Sentencing Table

Criminal History Category

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	Zone A		0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	Zone B		8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	Zone C		21-27	24-30
11	8-14	10-16	12-18	15-21	27-30	27-33
12	10-16	12-18	15-21	18-24	27-33	30-37
13	12-18	15-21	18-24	Zone D		33-41

Zone A Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	
3	0-6	0-6	0-6	0-6		
4	0-6	0-6	0-6			
5	0-6	0-6				
6	0-6					
7	0-6					
8	0-6					

**See §§5B1.1(a)(1)
& 5C1.1(a) & (b)**

- Fine
- Straight Probation
- Imprisonment

Zone B Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						1-7
3					2-8	3-9
4				2-8	4-10	6-12
5			1-7	4-10	6-12	9-15
6		1-7	2-8	6-12	9-15	
7		2-8	4-10	8-14		
8		4-10	6-12			
9	4-10	6-12	8-14			
10	6-12	8-14				
11	8-14					

***See §§5B1.1(a)(2)
& 5C1.1(a) & (c)***

- Probation plus a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment.
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment.
- Imprisonment

Zone C Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						
3						
4	<i>See §5C1.1(a) & (d)</i>					
5						
6						12-18
7					12-18	
8				10-16		
9				12-18		
10			10-16			
11		10-16	12-18			
12	10-16	12-18				
13	12-18					

- Imprisonment of at least one half of the minimum term **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.
- Imprisonment

Zone D

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
---------------	---------------	----------------	----------------	---------------	-----------------	--------------------

6

7

8

9

10

11

12

13

14

15

16

See §5C1.1(a) & (f)

15-21

15-21

18-24

18-24

21-27

15-21

21-27

24-30

18-24

24-30

27-33

15-21

21-27

27-33

30-37

15-21

18-24

24-30

30-37

33-41

15-21

18-24

21-27

27-33

33-41

37-46

18-24

21-27

24-30

30-37

37-46

41-51

21-27

24-30

27-33

33-41

41-51

46-57



• Imprisonment

Other Aspects of Sentence

Chapter Five

- Probation (§5B)
- Supervised release (§5D)
- Restitution, fines, assessments, forfeitures (§5E)
- Sentencing options (§5F)
- Undischarged terms (consecutive/concurrent) (§5G1.3)

Departures and Variances



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Substantial Assistance Departures

§5K1.1

&

18

U.S.C. § 3553(e)



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Substantial Assistance

§5K1.1

Permits a sentence below
the minimum of the guideline range

18 U.S.C. § 3553(e)

Permits a sentence below
a mandatory minimum

Substantial Assistance (cont.)

§5K1.1 & 18 U.S.C. § 3553(e)

- Each requires a government motion
 - *Wade v. U.S.*, 504 U.S. 181 (1992)
- A separate government motion under 18 U.S.C. § 3553(e) is required to go below a mandatory minimum
 - *Melendez v. U.S.*, 518 U.S. 120 (1996)

Substantial Assistance (cont.)

18 U.S.C. § 3553(e)

- A sentence below mandatory minimum is to be based only on substantial assistance

Other Departures



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Departures

- List of Departure Provisions
 - Located at end of *Guidelines Manual*
 - Lists all provisions in *Manual* indicating specific departure grounds
- Examples of departure provisions
 - §5K2.0 – Grounds for Departure
 - §5K3.1 – Early Disposition Programs (“Fast Track”)
 - §4A1.3 – Inadequacy of Criminal History Category
 - §2B1.1, App. Note 20 – Offense level overstates/understates seriousness of offense

Variations



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Variations Based on Policy Disagreements

Kimbrough v. U.S., 128 S. Ct. 558 (2007)

U.S. v. Spears, 129 S. Ct. 840 (2009)

Pepper v. U.S., 131 S. Ct. 1229 (2011)

District courts may in appropriate cases vary from the guidelines based on a policy disagreement

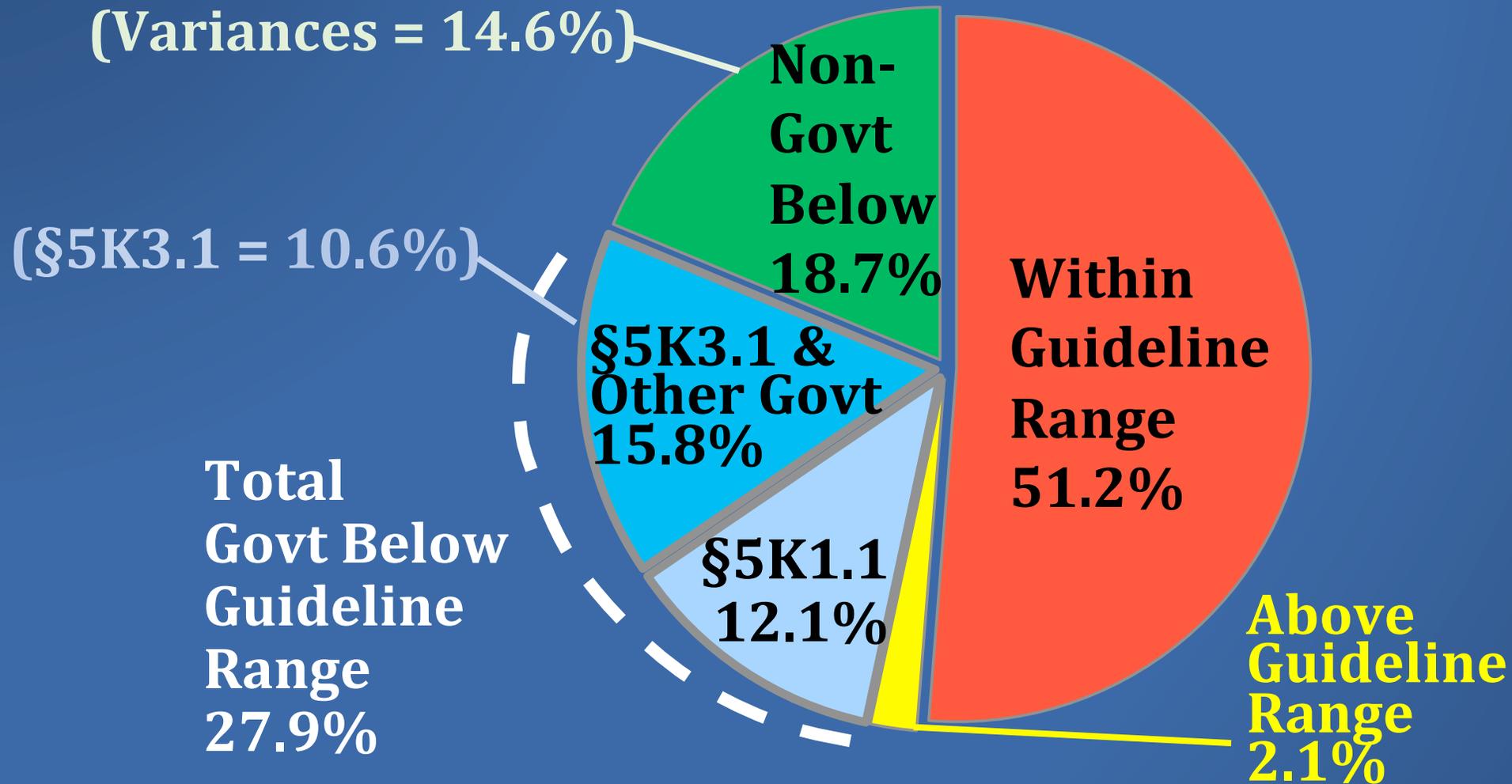
“Deconstruction” Arguments

- “Deconstruction” is a *Kimbrough*-based argument that a specific guideline is flawed because it was developed without the Commission’s exercise of its traditional institutional role
 - Frequently the argument is that the guideline is not based on empirical research

Notice for Sentences Outside the Applicable Guideline Range

- Notice is required for a departure
 - *Burns v. U.S.*, 501 U.S. 129 (1991)
 - Fed. R. Crim. P. 32(h)
 - Can be satisfied if the ground is identified in the presentence report or in prehearing submissions
- Notice is NOT required for a variance
 - *Irizarry v. U.S.*, 553 U.S. 708 (2008)

Position of Sentences in Relation to Guideline Range National - FY 2013



SOURCE: 2013 Sourcebook of Federal Sentencing Statistics

Thank You!